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GUIDE TO THE MONTANA MAJOR FACILITY SITING ACT

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A GUIDE TO THE **MONTANA MAJOR FACILITY SITING ACT**

Prepared for the 49th Legislature
to assist legislators in their
deliberations on the Montana Major
Facility Siting Act.
January, 1985

Montana Environmental Quality Council
Capitol Station
Helena, Montana 59620
(406) 444-3742

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Introduction

The Montana Major Facility Siting Act governs the siting of most energy-producing, converting and transporting facilities in Montana. The Act's two principle concerns are: 1) whether there is a public need for the proposed facility, and 2) whether the proposed facility, when compared with other reasonable alternatives, will minimize adverse impact on the environment. In addition, the Act emphasizes that because Montana citizens have an interest in the resources affected by these facilities, the decisions on facility siting proposals should be public, with opportunity for citizen input.

This guide provides an overview of the Act and its implementation. It will address the following questions:

- What is the history of the Act?
- What projects are covered by the Act?
- How are applications to construct major facilities processed?
- What information must applicants provide in their applications?
- What are the standards for denial or approval of projects?

This guide reflects some interpretations provided by the Board of Natural Resources and Conservation (BNRC) in its new rules addressing the Montana Major Facility Siting Act. These rules show how the Siting Act is applied to applicants and certificate holders.

Overview

The Montana Major Facility Siting Act provides a comprehensive state agency and citizen board review of the siting and construction of most major facilities engaged in the generation, conversion, or distribution of energy. The Act essentially provides one set of state requirements for

these facilities; other state laws, except those specifying air and water quality requirements, employee protection requirements and those involving constitutional water use and public land guarantees are superseded by the Act.

The Act recognizes two public goals: the constitutional objective of maintaining a clean and healthful environment, and the need to meet increasing demands for electricity and other forms of energy. It further recognizes that major energy facilities have an impact on the environment, population concentration, and citizen welfare. Based on these concerns, the 44th Legislature (1975) deemed it "necessary to ensure that the location, construction, and operation of power and energy facilities will produce minimal adverse effects on the environment and upon the citizens of this state....". Thus, persons seeking to construct a major facility in Montana must obtain a certificate of environmental compatibility and public need from the Board of Natural Resources and Conservation (BNRC).

To obtain this certificate, a proposed project must undergo analysis for air and water quality permits by the Department of Health and Environmental Sciences, and intensive study by the Department of Natural Resources and Conservation (DNRC) on probable environmental impacts and projections of need. Although the Siting Act does not provide guidance on the Board of Health and Environmental Sciences (BHES) air and water quality permitting decision, it does detail standards for the final BNRC decision on the application. This decision represents a balancing of the costs and benefits of the proposed facility, and of the impacts associated with its construction.

History

The Utility Siting Act

Controversy over the construction of the first two units of the Colstrip mine-mouth power generating facility, combined with a 1971 North Central Great Plains Study which projected that several coal mine-mouth generating and gasification plants would eventually be built in Montana, prompted concern about regulating these facilities.

Responding to a need for regulation, the 42nd Legislature (1973) enacted the Utility Siting Act. This act had four basic elements: certification (before-the-fact permission by the state), fact-finding (gathering of material by the state agency prior to permitting utility construction), funding from a fee paid by the applicant, and public involvement through a public hearing process.

Subsequent Legislation

The 43rd Legislature (1974) focused primarily on amending the Utility Siting Act to include provisions for use of geothermal energy. The 44th Legislature (1975), however, made more comprehensive changes. It changed the Act's title to the Montana Major Facility Siting Act, and also:

- expanded the Act's coverage to include facilities producing synthetic fuels; facility additions costing more than \$250,000; smaller electrical production facilities; and facilities using 500,000 or more tons of coal per year;
- added the consideration of "public interest, convenience, and necessity;"
- allowed a waiver of certification proceedings if an immediate, urgent need for a facility exists;
- added provisions stating when the BNRC may revoke or suspend a certificate; and
- placed the burden of proof on the applicant during the hearing.

The 45th Legislature (1977) debated many possible topics, but enacted only a provision offering a reduction in the statutory filing fee upon timely submission of a notice of intent to file an application.

The application for Colstrip units 3 and 4 in 1973 sparked further controversy over the Act. The extensive administrative treatment given to this application and the subsequent litigative delays resulted in considerable effort to modify the Act during the 46th Legislature (1979). In addition to several minor modifications, the Legislature:

- allowed the BNRC and the BHES hearings to be combined at the applicant's request, and set time frames for the BNRC hearings;

- declared the BHES decision on air and water quality conclusive, but gave the BNRC the right to review the proposal to insure minimum adverse environmental impact;
- allowed conditional air and water quality permits to be issued, and primary and alternative sites to be certified by the BHES or DHES;
- established time limits for the commencement of construction on pipelines and transmission lines;
- exempted crude oil and natural gas refineries and associated facilities, from the Act; and
- directed use of public lands whenever such use is as economically practicable as the use of private lands and meets environmental criteria specified by the Act.

The 47th Legislature (1981) also addressed the Act. Along with other minor amendments, it

- enabled the BNRC to adopt rules that may exempt, in certain instances, facilities engaged in innovative energy technologies; and
- provided partial waivers for certain facilities in counties where a large single employer has curtailed or ceased operation.

The 48th Legislature (1983) repealed exemptions previously given for federal projects.

Application of the Siting Act

The Siting Act requires that persons seeking to construct a facility must apply for and receive from the BNRC a certificate of environmental compatibility and public need. The terms "person" and "facility," therefore, essentially determine the coverage of the Act.

Definition of Person

The definition of person specifies who is covered by the Act. Among those included are private individuals, partnerships, corporations, cooperatives, associations, state and federal government agencies, and local governments. The Bonneville Power Administration, however, has questioned the extent that federal agencies must comply

with the Act. (See issues section, page 12, for further discussion.)

Definition of Facility

The facilities covered by the Act are specifically listed in the definitions section. These facilities include:

- electric-generating facilities;
- coal gasification facilities;
- facilities producing liquid hydrocarbon products;
- uranium-enrichment facilities;
- facilities using more than 500,000 tons of coal per year;
- pipelines designed to transport gas (but not natural gas), water, or liquid hydrocarbon products from or to energy and generation facilities;
- electric transmission lines; and
- facilities using geothermal resources.

Virtually all of these facility types have threshold levels that exempt small facilities. Electric transmission lines, for example, are exempted when they have a design capacity less than or equal to 69 kilovolts or, if they are less than 10 miles long, less than or equal to 230 kilovolts.

Oil and natural gas refineries, and affiliated facilities (including crude oil and natural gas pipelines) are specifically excluded from the Act. In addition, the BNRC may exempt by rule the relocation, reconstruction, or upgrading of facilities that 1) are unlikely to cause significant environmental impacts, or 2) employ technologies utilizing coal, wood, biomass, grain, wind, or sun as a fuel source in order to enhance conservation, efficiency, or system reliability.

Certification Process

Procedures for Obtaining a Certificate

The review process for proposed facilities begins before the application is submitted. Persons planning to

construct a facility in the next ten years must submit long range plans of their intentions to the DNRC at least two years before filing an application.

Submission of an application to the DNRC and the DHES triggers a 90 day period in which the agencies must notify the applicant of any deficiencies. If there are deficiencies, the applicant may correct them and resubmit the application. Upon resubmission, the DNRC and the DHES have 30 days to notify the applicant of the application's acceptability.

An acceptable application triggers study and evaluation by both departments. The DHES has one year for study and the DHES or BHES (as applicable) have an additional six months to decide if air and water quality permits should be issued. Opportunity for public review and comment must be provided during this process.

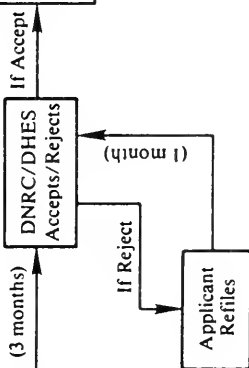
The DNRC has 22 months from the date it accepts the application to complete its study and prepare a report including recommendations to the BNRC. Exceptions are made for transmission lines and pipelines less than 30 miles long; in these cases, the study period is reduced to one year. The departments of highways; commerce; fish, wildlife, and parks; state lands; revenue; and public service regulation are required to report information to the DNRC concerning the impacts of the proposed facility during this period.

Upon receipt of the DNRC's report, the BNRC must set a public hearing date to begin within 120 days. A hearing examiner may be appointed to conduct the hearing. DHES or BHES hearings on air and water quality permits may be combined with the BNRC certification hearings at the request of the applicant. The hearing examiner must submit findings and a recommended decision to the BNRC within 60 days after the hearing, or within 90 days if a joint BNRC and BHES hearing is held. In addition, he must ensure that the time period between the filing of the DNRC's report and the issuance of his recommendations does not exceed nine calendar months, unless waived by the BNRC for good cause.

The BNRC is required to issue its decision within 60 days after the written recommended decision is submitted by the hearing examiner. This decision may be appealed to state district court.

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graph LR
    A[Applicant Identifies Facility in Long-Range Plan] --> B[Applicant Files Intent to Apply (Optional)]
    B -- "(12 months)" --> C[Application Filed]
    C -- "(2 years)" --> A
  
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^aUnless extended by the BNRC for good cause.

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Waiver of Certification Proceedings

The BNRC may waive certification proceedings for major facilities in two instances. The first is the existence of a clear and immediate need for the proposed facility, which need was not known sufficiently in advance to allow compliance with the Act. The second instance arises when natural disasters or civil disorders damage or destroy a facility, creating an immediate need for a replacement.

Waivers from alternative siting requirements for certain facilities may be available in counties where a large single employer has ceased or curtailed operations. These waivers must be supported by the affected county and municipal governments.

Filing Fees

Every applicant for a certificate of environmental compatibility and public need must pay a filing fee. A statutory formula specifies the maximum filing fee that may be assessed. However, recently the DNRC has been contracting with the applicant for the payment of DNRC actual expenses. Generally, the applicant submits payments on a monthly or quarterly basis subject to the limitation that the total sum of payments may not exceed the statutory filing fee.

All filing fees are placed into an earmarked fund used for administering the Act.

Substantive Application Requirements

The DNRC coordinates the application process for a certificate of environmental compatibility and public need, though applications must be submitted to both the DNRC and the DHES. By law, the application must include:

- a description of the facility and its location;
- a summary of studies made on the environmental impact of the facility;
- a statement explaining the need for the facility;

- a description of reasonable alternate locations, and an explanation of why the primary location is the best choice;
- baseline data for the primary and alternate locations; and
- other information as required by the DNRC or the DHES.

The new BNRC rules specify in detail these application requirements. In brief, the Siting Act rules address four major areas: the need for the proposed facility; alternatives to the proposed facility; alternative sites for the proposed facility; and information about the design, construction, and operation of the proposed facility.

The BNRC has written specific rules for two types of facilities: energy conversion and generation facilities (e.g., electricity-producing plants, coal gasification plants) and linear facilities (transmission lines and pipelines). Requirements vary according to whether the applicant is a service area utility, competitive utility, or non-utility.

DNRC Analysis and Recommendations

The DNRC has several functions as the department responsible for administering the Siting Act. Its most important role is to analyze certificate applications and recommend decisions to the BNRC. This role involves reviewing substantive conclusions in the application, comments received at public hearings, and special studies undertaken by the DNRC itself. From this information, the DNRC must write a report to the BNRC which includes recommendations for the proposed project.

The DNRC's recommendations may be both specific (e.g., recommending minor modifications to the proposed facility) and general (e.g., recommending whether the certificate should be issued). Because the DNRC is the lead department and has gained expertise from previous applications (see page 16), its recommendations receive strong consideration by the BNRC.

BNRC Decision

Content of the Decision

The BNRC may deny, grant, or conditionally grant the certificate. An opinion stating the reasons for any action taken must be attached. To grant or conditionally grant the certificate, the BNRC must find that the applicant has demonstrated by clear and convincing evidence that the application should be granted and that the criteria in 75-20-301, MCA, are fulfilled.

Any certificate issued by the BNRC must contain an environmental evaluation and a statement by the applicant of intent to comply with the certificate. The environmental evaluation must describe the environmental impacts, monitoring plans, alternatives, time frame for construction and other findings concerning the facility.

Section 75-20-301 Criteria

Section 75-20-301 specifies the substantive findings needed before the BNRC may issue a certificate of environmental compatibility and public need, with or without conditions. Under this section, the BNRC must find and determine:

- the basis of the need for the facility;
- the nature of the probable environmental impact;
- that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives;
- the effect on, or the importance of, environmental factors specified in 75-20-503;
- that the proposed location of the facility conforms to local and state regulations, unless the board determines these regulations to be unduly restrictive;
- that DHES or BHES has issued a decision, opinion, order, certification, or permit regarding the proposed facility;
- that the use of public lands was evaluated and selected whenever their use is as economically feasible as the use of private lands and compatible with the 75-20-503 environmental criteria; and

- that, for utilities only, the facility will serve the public interest, convenience and necessity.

If the BNRC decides to issue a certificate for a nuclear facility, the decision must also be approved by a majority of the voters in a state-wide election. This requirement is in addition to other requirements directly addressing nuclear facilities in Part 12 of the Siting Act.

The need determination, the minimum adverse environmental impact determination, and the determination of public interest, convenience, and necessity are extensively delineated by the BNRC rules.

Agency Post-Certification Responsibilities

Monitoring and enforcement are the primary agency responsibilities after a certificate has been issued. The BNRC, the DNRC, the BHES, and the DHES all have ongoing responsibility to monitor certified facilities for compliance with certificate conditions and with air and water quality permits.

A substantial condition with linear facilities involves the actual selection of a centerline. The rules allow a certificate to be issued for a linear facility when only the general corridor, not its actual location, is known. The guidance provided in the rules for centerlines within sensitive areas is then used to insure that there is minimum adverse environmental impact.

The BNRC has substantial enforcement powers, including the ability to revoke or suspend certificates if:

- false statements are found in the applicant's application or in accompanying information provided by the applicant;
- the applicant has failed to maintain safety standards or has not complied with the terms of the certificate; or
- the applicant has violated any provisions of the Act or the rules implementing the Act, or any order of the BNRC or the DNRC.

More common enforcement actions include the assessment of fines and penalties for violations and injunctive actions through the attorney general to stop violations. All fines and penalties are earmarked for use by the DNRC in administering the program.

The DNRC will review applications to amend certifications that have already been issued. In these instances, the DNRC must determine if the change would add significantly to the facility's environmental impact or would substantially change its location. If its finding is positive, a public hearing is conducted to determine if the permit should be granted. In addition, the application is referred to the DHES or the BHES for review if air or water quality permit conditions might be violated.

Legal Recourse for Private Citizens

Private citizens can bring actions against the BNRC certificate decision and against the certificate holder for violations of the Act. To contest the BNRC decision, however, the citizen must have participated in a hearing on the application before the BNRC or the BHES, or must reside in one of the areas where the facility may be located.

State citizens may also bring actions against public officers or employees who neglect or refuse to enforce the Act, provided they first notify the public officer or employee of his failure to enforce the requirement in question and provide reasonable time for them to take appropriate enforcement action.

Finally, private citizens who own real property have the option of direct legal action against the certificate holder when their water supply is contaminated, reduced, or interrupted by the operation of the facility.

Recent Issues Concerning the Siting Act

In the past year, two major issues involving the Montana Major Facility Siting Act have been addressed by the courts. One issue is coverage of federal agencies under the Act. The other issue concerns the BNRC assessment of

need under the Act and its relation to the Public Service Commission's "used and useful" determination.

Federal Agencies and the Siting Act

Federal agencies are placed under the Montana Major Facility Siting Act by a Federal Land Policy and Management Act (FLPMA) provision that requires federal agencies to comply with state standards for "public health and safety, environmental protection, and siting, construction, and maintenance of or for rights of way...." A recent federal case involving a Bonneville Power Administration (BPA) transmission line proposal has clarified this requirement in regard to the Montana Major Facility Siting Act. In this case, the BPA asserted that it did not need to comply with the Montana Major Facility Siting Act certification process or with the substantive requirements of the Act. In July 1984 the Ninth Circuit Court of Appeals found that the FLPMA did not require federal agencies to participate in the state certification process. However, the Court found that the substantive requirements in the Montana Major Facility Siting Act were substantive standards within the intent of the FLPMA. These standards, it determined, must be complied with for that portion of a federal facility that is located on federal land in Montana.

BNRC and Public Service Commission Decisions

An important element of the Siting Act is its general precedence over other state laws. This authority means that if the BNRC renders a decision in a subject area also covered by another agency, the BNRC decision prevails. One of the BNRC decision components is a need assessment. This determination is controversial because it deals with economic projections that are difficult to assess accurately and with subject matter similar to that under the jurisdiction of the Public Service Commission. As opposed to the Public Service Commission's used and useful rate base determination, however, the Siting Act's need assessment looks forward to what the need for the facility is likely to be.

The Montana Supreme Court recently concluded that the BNRC certification decision is distinct from, and does not implicitly repeal, the Public Service Commission's "used and useful" rate base determination. The latter requires that utility properties must be "actually used and useful" to be included in a utility's rate base. In distinguishing the two findings, the Supreme Court noted that the need determination in the Act had an environmental protection orientation. Conversely, it found that the PSC determination of whether the facility is used and useful could be unrelated to environmental and natural resource concerns. The Court then stated that the findings involved "a two-step process: (1) the utility obtains a certificate from the BNRC under the Siting Act before construction may be commenced; (2) having constructed the plant, the utility requests rate base treatment for the new facility and the PSC then determines whether the facility is actually used and useful."

Additional Information and References

The Montana Major Facility Siting Act is a thorough, complex piece of environmental legislation. For assistance in interpreting the Act, contacts include:

Montana Environmental Quality Council
Capitol Station
Helena, MT 59620
406/444-3742

Montana Department of Natural Resources and
Conservation
Energy Division
32 South Ewing
Helena, MT 59620
406/444-6697

References include:

The Montana Major Facility Siting Act, sections 75-20-101 to -1205, Montana Code Annotated (1983).

The Montana Major Facility Siting Act Rules, to be published in Title 36, Administrative Rules Montana (1983).

Justification of the Major Facility Siting Act Rules, Montana Department of Natural Resources and Conservation, October 1984.

Responses to Comments on the Major Facility Siting Act Rules. Montana Department of Natural Resources and Conservation, November 1984.

Carter, Mickale. "The Montana Major Facility Siting Act." 45 Montana Law Review 113 (1984).

Lopach, James J., and Gregory J. Petesch. Reforming the Montana Major Facility Siting Act. Ford Foundation Program in Policy Analysis for State Environmental Management. University of Montana: Missoula, Montana (1978).

McBride, Kathleen. "Implementing the Northwest Power Plan: Conflicts with Montana's Major Facility Siting Act." 5 Public Land Law Review 68 (1984).

Orth, John. Reports to the Montana Environmental Quality Council on the Major Facility Siting Act Rules Development Process. July 10, October 20, and November 15, 1984.

Siroky, Laurence. Memorandum on the Major Facility Siting Act Rules. Montana Department of Natural Resources and Conservation, June 5, 1984.

Appendices

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Applications Reviewed Under the Siting Act

1. Billings - Yellowtail 161 kV transmission line
Applicant: Pacific Power and Light
Certificate granted: 5/4/73
2. Laurel - Bridger 100 kV transmission line
Applicant: Montana Power Company
Certificate granted: 9/14/73
3. Anaconda - Arbiter 230 kV transmission line
Applicant: Montana Power Company
Certificate granted: 7/20/73, 3/10/73
4. Billings Eastside Substation 100 kV transmission line
Applicant: Montana Power Company
Certificate granted: 7/20/73
5. Laurel - Billings 100 kV transmission line
Applicant: Montana Power Company
Certificate granted: 9/14/73
6. Colstrip Units 3 and 4, and 500 kV transmission lines from Colstrip to Hot Springs
Applicants: Montana Power Company (30%), Puget Sound Power and Light (25%), Portland General Electric Company (20%), Washington Water Power Company (15%), Pacific Power and Light Company (10%)
Certificate granted: 7/22/76. Centerline approvals for various portions of the transmission lines were granted later.
7. Colstrip - Broadview 230 kV transmission line
Applicants: Montana Power Company, Puget Sound Power and Light Company
Certificate granted: 11/15/74. Centerline approvals were granted in 1975.
8. Colstrip 1 and 2 Associated Facilities: water supply system and 115 kV transmission line from Colstrip to pumping station
Applicants: Montana Power Company, Puget Sound Power and Light Company
Certificate granted: 3/1/74

9. Circle - Flowing Well 69 kV transmission line
Applicant: McCone Electric Cooperative
Certificate granted: 9/13/74
10. Bridger - Roberts 50/69 kV transmission line
Applicant: Beartooth Electric Cooperative
Certificate granted: 5/16/75, Board requested applicants to submit exact centerline location -- no record of a later request.
11. Ulm 100 kV transmission line
Applicant: Montana Power Company
Certificate granted: 3/10/75, Board approved amendment to certificate 5/16/75
12. Anaconda - Hamilton 161 kV transmission line
Applicant: Montana Power Company
Certificate granted: 10/28/77, Board approved amendment to certificate 6/5/81, centerline locations approved 8/7/81 and 1/20/84.
13. Broadview - Alkali Creek 230 kV transmission line
Applicant: Montana Power Company
Certificate granted: 1/28/77, Board approved amendment to certificate 2/23/79.
14. Continental Oil 100 kV transmission line
Applicant: Montana Power Company
Certificate granted: 5/16/75
15. Wilsall - Clyde Park 161 kV transmission line
Applicant: Montana Power Company
Certificate granted: 6/26/75, Board approved centerline location 12/5/75.
16. Clyde Park - Dillon 161 kV transmission line
Applicant: Montana Power Company
Certificate granted: 10/28/77. Centerline locations approved in 6/21/78, 8/7/81, 8/19/83, 1/20/84, and 4/13/84. Centerline approvals for other line segments are pending.
17. Broadview - Grass Range - Glengarry 100 kV transmission line
Applicant: Montana Power Company, Fergus Electric Coop.
Certificate granted: 9/29/78. Board approved

change in certificate as proposed by applicant
10/15/79. Centerline locations approved 9/21/78.

18. Troy - Mt. Vernon 115 kV transmission line
Applicant: Northern Lights, Inc.
Certificate granted: 5/4/79. Centerline
locations approved 9/21/79 and 6/6/80.
19. Kootenai Falls Hydroelectric Project - 144 mW
Applicant: Northern Lights, Inc.
Certificate status: DNRC and Northern Lights
signed agreement to waive MFSA time frames on
application (to await conclusion of FERC
licensing process) 1/21/83.
20. Fort Peck - Havre 230 kV transmission line
Applicant: Western Area Power Administration
Certificate status: Board determined that
project complied with the substantive
requirements of MFSA 8/19/83.
21. Salem Coal-Fired Power Plant - 350 mW
Applicant: Montana Power Company
Certificate status: DNRC rejected MPC's
application, finding that application was
deficient in certain areas and not in compliance
with the MFSA 5/5/83.
22. Central Montana (Glengarry-Judith Gap) 100 kV
transmission line
Applicant: Montana Power Company
Certificate status: DNRC held public hearings on
project 3/8/84 and 7/2/84.
23. Noxon - Pine Creek, ID 230 kV transmission line
Applicant: Washington Water Power Company
Certificate status: Board ruled that the project
is exempt from MFSA. Board also adopted
construction and mitigation standards for project
3/9/84.
24. Laurel - Bridger "B" Line
Applicant: Montana Power Company
Certificate status: DNRC accepted application and
asked to receive supplemental information by
8/16/84.

25. Great Falls - Conrad 230 kV transmission line
Applicant: Western Area Power Administration
Certificate status: Board determined that line
complied with substantive requirements of MFSA
9/24/84.

The Montana Major Facility Siting Act

Part 1 — Policy and General Provisions

Section

- 75-20-101. Short title.
- 75-20-102. Policy and legislative findings.
- 75-20-103. Chapter supersedes other laws or rules.
- 75-20-104. Definitions.
- 75-20-105. Adoption of rules.
- 75-20-106. Contracts for information.
- 75-20-107 through 75-20-110 reserved.
- 75-20-111. Grants, gifts, and funds.
- 75-20-112. Money to state special revenue fund.

Part 2 — Certification Proceedings

- 75-20-201. Certificate required — operation in conformance — certificate for nuclear facility — applicability to federal facilities.
- 75-20-202. Exemptions.
- 75-20-203. Certificate transferable.
- 75-20-204 through 75-20-210 reserved.
- 75-20-211. Application — filing and contents — proof of service and notice.
- 75-20-212. Cure for failure of service.
- 75-20-213. Supplemental material — amendments.
- 75-20-214. Notice of intent to file.
- 75-20-215. Filing fee — accountability — refund — use.
- 75-20-216. Study, evaluation, and report on proposed facility — assistance by other agencies.
- 75-20-217. Voiding an application.
- 75-20-218. Hearing date — location — department to act as staff — hearings to be held jointly.
- 75-20-219. Amendments to a certificate.
- 75-20-220. Hearing examiner — restrictions — duties.
- 75-20-221. Parties to certification proceeding — waiver — statement of intent to participate.
- 75-20-222. Record of hearing — procedure — rules of evidence — burden of proof.

Part 3 — Decisions

- 75-20-301. Decision of board — findings necessary for certification.
- 75-20-302. Conditions imposed.
- 75-20-303. Opinion issued with decision — contents.
- 75-20-304. Waiver of provisions of certification proceedings.

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- 75-20-404. Enforcement of chapter by residents.
- 75-20-405. Action to recover damages to water supply.
- 75-20-406. Judicial review of board, board of health, and department of health decisions.
- 75-20-407. Jurisdiction of courts restricted.
- 75-20-408. Penalties for violation of chapter — civil action by attorney general.
- 75-20-409. Optional annual installments for location of facility on landowner's property.

- 75-20-410. Order not stayed by appeal — stay or suspension by court — limitations.
75-20-411. Surety bond — other security.

Part 5 — Long-Range Plans

- 75-20-501. Annual long-range plan submitted — contents — available to public.
75-20-502. Study of included facilities.
75-20-503. Environmental factors evaluated.

Parts 6 through 9 reserved

Part 10 — Geothermal Exploration

- 75-20-1001. Geothermal exploration — notification of department.

Part 11 — Energy Conversion Facility (Repealed. Sec. 28, Ch. 676, L. 1979)

Part 12 — Nuclear Energy Conversion

- 75-20-1201. Purpose — findings as to nuclear safety — reservation of nuclear facility approval powers to the people.
75-20-1202. Definitions.
75-20-1203. Additional requirements for issuance of a certificate for the siting of a nuclear facility.
75-20-1204. Annual review of evacuation and emergency medical aid plans.
75-20-1205. Emergency approval authority invalid for nuclear facilities.

Chapter Cross-References

Application of nuclear regulation provisions, 10, part 4.
75-3-302.

Montana Hazardous Waste Act, Title 75, ch.

Part 1

Policy and General Provisions

75-20-101. Short title. This chapter shall be known and may be cited as the “Montana Major Facility Siting Act”.

History: En. Sec. 1, Ch. 327, L. 1973; **amd.** Sec. 1, Ch. 494, L. 1975; R.C.M. 1947, 70-801.

Cross-References

State policy of consistency and continuity in the adoption and application of environmental rules, 90-1-101.

75-20-102. Policy and legislative findings. (1) It is the constitutionally declared policy of this state to maintain and improve a clean and healthful environment for present and future generations, to protect the environmental life-support system from degradation and prevent unreasonable depletion and degradation of natural resources, and to provide for administration and enforcement to attain these objectives.

(2) The legislature finds that the construction of additional power or energy conversion facilities may be necessary to meet the increasing need for electricity, energy, and other products and that these facilities have an effect on the environment, an impact on population concentration, and an effect on

the welfare of the citizens of this state. Therefore, it is necessary to ensure that the location, construction, and operation of power and energy conversion facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a power or energy conversion facility may not be constructed or operated within this state without a certificate of environmental compatibility and public need acquired pursuant to this chapter.

History: En. Sec. 2, Ch. 327, L. 1973; amd. Sec. 2, Ch. 494, L. 1975; R.C.M. 1947, 70-802.

Cross-References

Right to clean and healthful environment, Duty to maintain a clean and healthful environment, Art. IX, sec. 1, Mont. Const.
Art. II, sec. 3, Mont. Const.

75-20-103. Chapter supersedes other laws or rules. This chapter supersedes other laws or regulations except as provided in 75-20-401. If any provision of this chapter is in conflict with any other law of this state or any rule promulgated thereunder, this chapter shall govern and control and the other law or rule shall be deemed superseded for the purpose of this chapter. Amendments to this chapter shall have the same effect.

History: En. Sec. 23, Ch. 327, L. 1973; amd. Sec. 23, Ch. 494, L. 1975; R.C.M. 1947, 70-823; amd. Sec. 1, Ch. 676, L. 1979.

75-20-104. Definitions. In this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Addition thereto" means the installation of new machinery and equipment which would significantly change the conditions under which the facility is operated.

(2) "Application" means an application for a certificate submitted in accordance with this chapter and the rules adopted hereunder.

(3) "Associated facilities" includes but is not limited to transportation links of any kind, aqueducts, diversion dams, transmission substations, storage ponds, reservoirs, and any other device or equipment associated with the production or delivery of the energy form or product produced by a facility, except that the term does not include a facility.

(4) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104.

(6) "Certificate" means the certificate of environmental compatibility and public need issued by the board under this chapter that is required for the construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site or route of a facility but does not mean changes needed for temporary use of sites or routes for nonutility purposes or uses in securing geological data, including necessary borings to ascertain foundation conditions;

(b) the fracturing of underground formations by any means if such activity is related to the possible future development of a gasification facility or a facility employing geothermal resources but does not include the gathering of geological data by boring of test holes or other underground exploration, investigation, or experimentation;

(c) the commencement of eminent domain proceedings under Title 70, chapter 30, for land or rights-of-way upon or over which a facility may be constructed;

(d) the relocation or upgrading of an existing facility defined by (b) or (c) of subsection (10), including upgrading to a design capacity covered by subsection (10)(b), except that the term does not include normal maintenance or repair of an existing facility.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(10) "Facility" means:

(a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of \$10 million;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of \$10 million;

(iii) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto having an estimated cost in excess of \$10 million;

(iv) enriching uranium minerals or any addition thereto having an estimated cost in excess of \$10 million; or

(v) utilizing or converting 500,000 tons of coal per year or more or any addition thereto having an estimated cost in excess of \$10 million;

(b) each electric transmission line and associated facilities of a design capacity of more than 69 kilovolts, except that the term does not include an electric transmission line and associated facilities of a design capacity of 230 kilovolts or less and 10 miles or less in length;

(c) each pipeline and associated facilities designed for or capable of transporting gas (except for natural gas), water, or liquid hydrocarbon products from or to a facility located within or without this state of the size indicated in subsection (10)(a) of this section;

(d) any use of geothermal resources, including the use of underground space in existence or to be created, for the creation, use, or conversion of energy, designed for or capable of producing geothermally derived power equivalent to 25 million Btu per hour or more or any addition thereto having an estimated cost in excess of \$750,000;

(e) any underground in situ gasification of coal.

(11) "Person" means any individual, group, firm, partnership, corporation, cooperative, association, government subdivision, government agency, local government, or other organization or entity.

(12) "Transmission substation" means any structure, device, or equipment assemblage, commonly located and designed for voltage regulation, circuit

protection, or switching necessary for the construction or operation of a proposed transmission line.

(13) "Utility" means any person engaged in any aspect of the production, storage, sale, delivery, or furnishing of heat, electricity, gas, hydrocarbon products, or energy in any form for ultimate public use.

History: En. Sec. 3, Ch. 327, L. 1973; amd. Sec. 1, Ch. 231, L. 1974; amd. Sec. 1, Ch. 268, L. 1974; amd. Sec. 3, Ch. 494, L. 1975; R.C.M. 1947, 70-803; amd. Sec. 1, Ch. 133, L. 1979; amd. Sec. 1, Ch. 527, L. 1979; amd. Sec. 2, Ch. 676, L. 1979; amd. Sec. 1, Ch. 539, L. 1981.

Compiler's Comments

1981 Amendment: Substituted "would significantly change the conditions under which the facility is operated" for "would significantly change the conditions under which the certificate was issued" at the end of (1); added facilities subject to The Montana Strip and Under-

ground Mine Reclamation Act within the exception to the definition of facility in (10)(a); increased \$250,000 to \$10 million throughout (10)(a); deleted "refining" after "utilizing" in (10)(a)(v); and increased \$250,000 to \$750,000 at the end of (10)(d).

75-20-105. Adoption of rules. The board may adopt rules implementing the provisions of this chapter, including but not limited to:

- (1) rules governing the form and content of applications;
- (2) rules further defining the terms used in this chapter;
- (3) rules governing the form and content of long-range plans;
- (4) any other rules the board considers necessary to accomplish the purposes and objectives of this chapter.

History: En. Sec. 20, Ch. 327, L. 1973; amd. Sec. 4, Ch. 268, L. 1974; amd. Sec. 20, Ch. 494, L. 1975; R.C.M. 1947, 70-820(1).

Cross-References

Montana Administrative Procedure Act — adoption of rules, Title 2, ch. 4, part 3.

75-20-106. Contracts for information. (1) The department may contract with a potential applicant under this chapter in advance of the filing of a formal application for the development of information or provision of services required hereunder.

(2) Payments made to the department under such a contract shall be credited against the fee payable hereunder.

History: En. Sec. 6, Ch. 327, L. 1973; amd. Sec. 1, Ch. 115, L. 1974; amd. Sec. 2, Ch. 268, L. 1974; amd. Sec. 1, Ch. 270, L. 1975; amd. Sec. 6, Ch. 494, L. 1975; amd. Sec. 1, Ch. 179, L. 1977; R.C.M. 1947, 70-806(2)(c).

75-20-107 through 75-20-110 reserved.

75-20-111. Grants, gifts, and funds. The department may receive grants, gifts, and other funds from any public or private source to assist in its activities under this chapter.

History: En. Sec. 22, Ch. 327, L. 1973; amd. Sec. 22, Ch. 494, L. 1975; R.C.M. 1947, 70-822.

75-20-112. Money to state special revenue fund. All fees, taxes, fines, and penalties collected under this chapter shall be deposited in the state special revenue fund for use by the department in carrying out its functions and responsibilities under this chapter.

History: En. 70-824 by Sec. 3, Ch. 270, L. 1975; R.C.M. 1947, 70-824; amd. Sec. 1, Ch. 277, L. 1983.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Part 2

Certification Proceedings

75-20-201. Certificate required — operation in conformance — certificate for nuclear facility — applicability to federal facilities.

(1) A person may not commence to construct a facility in the state without first applying for and obtaining a certificate of environmental compatibility and public need issued with respect to the facility by the board.

(2) A facility with respect to which a certificate is issued may not thereafter be constructed, operated, or maintained except in conformity with the certificate and any terms, conditions, and modifications contained therein.

(3) A certificate may only be issued pursuant to this chapter.

(4) If the board decides to issue a certificate for a nuclear facility, it shall report such recommendation to the applicant and may not issue the certificate until such recommendation is approved by a majority of the voters in a statewide election called by initiative or referendum according to the laws of this state.

(5) This chapter applies, to the fullest extent allowed by federal law, to all federal facilities and to all facilities over which an agency of the federal government has jurisdiction.

History: En. Sec. 4, Ch. 327, L. 1973; amd. Sec. 4, Ch. 494, L. 1975; R.C.M. 1947, 70-804(1); amd. Sec. 3, I.M. 80, app. Nov. 7, 1978; amd. Sec. 1, Ch. 167, L. 1983.

Compiler's Comments

1983 Amendment: Inserted (5).

75-20-202. Exemptions. (1) A certificate is not required under this chapter for a facility under diligent onsite physical construction or in operation on January 1, 1973.

(2) The board may adopt reasonable rules establishing exemptions from this chapter for the relocation, reconstruction, or upgrading of a facility that:

(a) would otherwise be covered by this chapter; and

(b) (i) is unlikely to have a significant environmental impact by reason of length, size, location, available space or right-of-way, or construction methods; or

(ii) utilizes coal, wood, biomass, grain, wind, or sun as a fuel source and the technology of which will result in greater efficiency, promote energy conservation, and promote greater system reliability than the existing facility.

History: En. Sec. 4, Ch. 327, L. 1973; amd. Sec. 4, Ch. 494, L. 1975; R.C.M. 1947, 70-804(3) thru (5); amd. Sec. 3, I.M. 80, app. Nov. 7, 1978; amd. Sec. 2, Ch. 539, L. 1981; amd. Sec. 2, Ch. 167, L. 1983.

Compiler's Comments

1983 Amendment: Deleted former (1), which read: "This chapter does not apply to any aspect of a facility over which an agency of the federal government has exclusive jurisdiction,

but applies to any unpreempted aspect of a facility over which an agency of the federal government has partial jurisdiction."

1981 Amendment: Added subsection (3)(b)(ii) (now (2)(b)(ii)).

75-20-203. Certificate transferable. A certificate may be transferred, subject to the approval of the board, to a person who agrees to comply with the terms, conditions, and modifications contained therein.

History: En. Sec. 4, Ch. 327, L. 1973; amd. Sec. 4, Ch. 494, L. 1975; R.C.M. 1947, 70-804(2); amd. Sec. 3, I.M. 80, app. Nov. 7, 1978; amd. Sec. 3, Ch. 676, L. 1979.

75-20-211. Application — filing and contents — proof of service and notice. (1) (a) An applicant shall file with the department and department of health a joint application for a certificate under this chapter and for the permits required under the laws administered by the department of health and the board of health in such form as the board requires under applicable rules, containing the following information:

- (i) a description of the location and of the facility to be built thereon;
- (ii) a summary of any studies which have been made of the environmental impact of the facility;
- (iii) a statement explaining the need for the facility;
- (iv) a description of reasonable alternate locations for the proposed facility, a general description of the comparative merits and detriments of each location submitted, and a statement of the reasons why the primary proposed location is best suited for the facility;
- (v) baseline data for the primary and reasonable alternate locations;
- (vi) at the applicant's option, an environmental study plan to satisfy the requirements of this chapter; and
- (vii) such other information as the applicant considers relevant or as the board and board of health by order or rule or the department and department of health by order or rule may require.

(b) A copy or copies of the studies referred to in subsection (1)(a)(ii) above shall be filed with the department, if ordered, and shall be available for public inspection.

(2) An application may consist of an application for two or more facilities in combination which are physically and directly attached to each other and are operationally a single operating entity.

(3) An application shall be accompanied by proof of service of a copy of the application on the chief executive officer of each unit of local government, county commissioner, city or county planning boards, and federal agencies charged with the duty of protecting the environment or of planning land use in the area in which any portion of the proposed facility may be located, both as primarily and as alternatively proposed and on the following state government agencies:

- (a) environmental quality council;
- (b) department of public service regulation;
- (c) department of fish, wildlife, and parks;
- (d) department of state lands;
- (e) department of commerce;
- (f) department of highways;
- (g) department of revenue.

(4) The copy of the application shall be accompanied by a notice specifying the date on or about which the application is to be filed.

(5) An application shall also be accompanied by proof that public notice thereof was given to persons residing in the area or alternative areas in which any portion of the proposed facility may be located, by publication of a summary of the application in those newspapers that will substantially inform those persons of the application.

History: En. Sec. 6, Ch. 327, L. 1973; amd. Sec. 1, Ch. 115, L. 1974; amd. Sec. 2, Ch. 268, L. 1974; amd. Sec. 1, Ch. 270, L. 1975; amd. Sec. 6, Ch. 494, L. 1975; amd. Sec. 1, Ch. 179, L. 1977;

R.C.M. 1947, 70-806(part); amd. Sec. 1, Ch. 553, L. 1979; amd. Sec. 4, Ch. 676, L. 1979; amd. Sec. 6, Ch. 274, L. 1981; amd. Sec. 3, Ch. 539, L. 1981.

Compiler's Comments

1981 Amendments: Chapter 274 substituted "department of commerce" for "department of community affairs" in (3)(e).

Chapter 539 substituted "for the permits required under the laws administered by the department of health and the board of health" for "for the permits required by state air and water quality laws" in (1)(a); and substituted "as the board and board of health by order or rule or the department and department of health by order or rule may require" for "as the board and board of health by rule or the department and department of health by order require" at the end of (1)(a)(vii).

Composite Section: This section was amended by Ch. 553 and Ch. 676, L. 1979, and a

composite section was prepared by the Code Commissioner, 1979. Subsection (3) regarding persons and agencies to be served with a copy of an application was amended by both of the above chapters. Ch. 676 deleted "chief executive officer of each" but the Code Commissioner reinserted this phrase to incorporate the change by Ch. 553 from "municipality" to "unit of local government".

Cross-References

Educational impact statement required — judicial enforcement, 20-1-208, 20-1-209.

Air quality permit required, 75-2-211.

Water quality permit required, Title 75, ch. 5, part 4.

75-20-212. Cure for failure of service. Inadvertent failure of service on or notice to any of the municipalities, government agencies, or persons identified in 75-20-211(3) and (5) may be cured pursuant to orders of the department designed to afford them adequate notice to enable their effective participation in the proceeding.

History: En. Sec. 6, Ch. 327, L. 1973; amd. Sec. 1, Ch. 115, L. 1974; amd. Sec. 2, Ch. 268, L. 1974; amd. Sec. 1, Ch. 270, L. 1975; amd. Sec. 6, Ch. 494, L. 1975; amd. Sec. 1, Ch. 179, L. 1977; R.C.M. 1947, 70-806(part).

75-20-213. Supplemental material — amendments. (1) An application for an amendment of an application or a certificate shall be in such form and contain such information as the board by rule or the department by order prescribes. Notice of such an application shall be given as set forth in (3), (4), and (5) of 75-20-211.

(2) An application may be amended by an applicant any time prior to the department's recommendation. If the proposed amendment is such that it prevents the department, the department of health, or the agencies listed in 75-20-216(5) from carrying out their duties and responsibilities under this chapter, the department may require such additional filing fees as the department determines necessary, or the department may require a new application and filing fee.

(3) The applicant shall submit supplemental material in a timely manner as requested by the department or as offered by the applicant to explain, support, or provide the detail with respect to an item described in the original application, without filing an application for an amendment. The department's determination as to whether information is supplemental or whether an application for amendment is required shall be conclusive.

History: En. Sec. 6, Ch. 327, L. 1973; amd. Sec. 1, Ch. 115, L. 1974, amd. Sec. 2, Ch. 268, L. 1974; amd. Sec. 1, Ch. 270, L. 1975; amd. Sec. 6, Ch. 494, L. 1975; amd. Sec. 1, Ch. 179, L. 1977; R.C.M. 1947, 70-806(6); amd. Sec. 5, Ch. 676, L. 1979.

75-20-214. Notice of intent to file. A potential applicant for a certificate may file a notice of intent to file an application for a certificate for a facility defined in 75-20-104(10) at least 12 months prior to the actual filing

of an application. The notice of intent shall specify the type and size of facility to be applied for, its preferred location, a description of reasonable alternative locations, and such information as the board by rule or department by order requires. An applicant complying with this section is entitled to a 5% reduction of the filing fee required under 75-20-215.

History: En. Sec. 6, Ch. 327, L. 1973; amd. Sec. 1, Ch. 115, L. 1974; amd. Sec. 2, Ch. 268, L. 1974; amd. Sec. 1, Ch. 270, L. 1975; amd. Sec. 6, Ch. 494, L. 1975; amd. Sec. 1, Ch. 179, L. 1977; R.C.M. 1947, 70-806(7); amd. Sec. 6, Ch. 676, L. 1979.

75-20-215. Filing fee — accountability — refund — use. (1) (a) A filing fee shall be deposited in the state special revenue fund for the use of the department in administering this chapter. The applicant shall pay to the department a filing fee as provided in this section based upon the department's estimated costs of processing the application under this chapter, but which shall not exceed the following scale based upon the estimated cost of the facility:

- (i) 2% of any estimated cost up to \$1 million; plus
- (ii) 1% of any estimated cost over \$1 million and up to \$20 million; plus
- (iii) 0.5% of any estimated cost over \$20 million and up to \$100 million; plus
- (iv) 0.25% of any amount of estimated cost over \$100 million and up to \$300 million; plus
- (v) .125% of any amount of estimated cost over \$300 million.

(b) The department may allow in its discretion a credit against the fee payable under this section for the development of information or providing of services required hereunder or required for preparation of an environmental impact statement under the Montana or national environmental policy acts. The applicant may submit the information to the department together with an accounting of the expenses incurred in preparing the information. The department shall evaluate the applicability, validity, and usefulness of the data and determine the amount which may be credited against the filing fee payable under this section. Upon 30 days' notice to the applicant, this credit may at any time be reduced if the department determines that it is necessary to carry out its responsibilities under this chapter.

(2) (a) The department may contract with an applicant for the development of information, provision of services and payment of fees required under this chapter. The contract may continue an agreement entered into pursuant to 75-20-106. Payments made to the department under such a contract shall be credited against the fee payable hereunder. Notwithstanding the provisions of this section, the revenue derived from the filing fee must be sufficient to enable the department, the department of health, the board, the board of health, and the agencies listed in 75-20-216(5) to carry out their responsibilities under this chapter. The department may amend a contract to require additional payments for necessary expenses up to the limits set forth in subsection (1)(a) above upon 30 days' notice to the applicant. The department and applicant may enter into a contract which exceeds the scale provided in subsection (1)(a).

(b) If a contract is not entered into, the applicant shall pay the filing fee in installments in accordance with a schedule of installments developed by the department, provided that no one installment may exceed 20% of the total filing fee provided for in subsection (1).

(3) The estimated cost of upgrading an existing transmission substation may not be included in the estimated cost of a proposed facility for the purpose of calculating a filing fee.

(4) If an application consists of a combination of two or more facilities, the filing fee shall be based on the total estimated cost of the combined facilities.

(5) The applicant is entitled to an accounting of moneys expended and to a refund with interest at the rate of 6% a year of that portion of the filing fee not expended by the department in carrying out its responsibilities under this chapter. A refund shall be made after all administrative and judicial remedies have been exhausted by all parties to the certification proceedings.

(6) The revenues derived from filing fees shall be used by the department in compiling the information required for rendering a decision on a certificate and for carrying out its and the board's other responsibilities under this chapter.

History: En. Sec. 6, Ch. 327, L. 1973; amd. Sec. 1, Ch. 115, L. 1974; amd. Sec. 2, Ch. 268, L. 1974; amd. Sec. 1, Ch. 270, L. 1975; amd. Sec. 6, Ch. 494, L. 1975; amd. Sec. 1, Ch. 179, L. 1977; R.C.M. 1947, 70-806(2)(a), (2)(b); amd. Sec. 7, Ch. 676, L. 1979; amd. Sec. 1, Ch. 277, L. 1983.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

75-20-216. Study, evaluation, and report on proposed facility — assistance by other agencies. (1) After receipt of an application, the department and department of health shall within 90 days notify the applicant in writing that:

(a) the application is in compliance and is accepted as complete; or

(b) the application is not in compliance and list the deficiencies therein; and upon correction of these deficiencies and resubmission by the applicant, the department and department of health shall within 30 days notify the applicant in writing that the application is in compliance and is accepted as complete.

(2) Upon receipt of an application complying with 75-20-211 through 75-20-215, and this section, the department shall commence an intensive study and evaluation of the proposed facility and its effects, considering all applicable criteria listed in 75-20-301 and 75-20-503 and the department of health shall commence a study to enable it or the board of health to issue a decision, opinion, order, certification, or permit as provided in subsection (3). The department and department of health shall use, to the extent they consider applicable, valid and useful existing studies and reports submitted by the applicant or compiled by a state or federal agency.

(3) The department of health shall within 1 year following the date of acceptance of an application and the board of health or department of health, if applicable, within an additional 6 months issue any decision, opinion, order, certification, or permit required under the laws administered by the department of health or the board of health and this chapter. The department of health and the board of health shall determine compliance with all standards, permit requirements, and implementation plans under their jurisdiction for the primary and reasonable alternate locations in their decision, opinion, order, certification, or permit. The decision, opinion, order,

certification, or permit, with or without conditions, is conclusive on all matters that the department of health and board of health administer, and any of the criteria specified in subsections (2) through (7) of 75-20-503 that are a part of the determinations made under the laws administered by the department of health and the board of health. Although the decision, opinion, order, certification, or permit issued under this subsection is conclusive, the board retains authority to make the determination required under 75-20-301(2)(c). The decision, opinion, order, certification, or permit of the department of health or the board of health satisfies the review requirements by those agencies and shall be acceptable in lieu of an environmental impact statement under the Montana Environmental Policy Act. A copy of the decision, opinion, order, certification, or permit shall be served upon the department and the board and shall be utilized as part of their final site selection process. Prior to the issuance of a preliminary decision by the department of health and pursuant to rules adopted by the board of health, the department of health shall provide an opportunity for public review and comment.

(4) Within 22 months following acceptance of an application for a facility as defined in (a) and (d) of 75-20-104(10) and for a facility as defined in (b) and (c) of 75-20-104(10) which is more than 30 miles in length and within 1 year for a facility as defined in (b) and (c) of 75-20-104(10) which is 30 miles or less in length, the department shall make a report to the board which shall contain the department's studies, evaluations, recommendations, other pertinent documents resulting from its study and evaluation, and an environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act, if any. If the application is for a combination of two or more facilities, the department shall make its report to the board within the greater of the lengths of time provided for in this subsection for either of the facilities.

(5) The departments of highways; commerce; fish, wildlife, and parks; state lands; revenue; and public service regulation shall report to the department information relating to the impact of the proposed site on each department's area of expertise. The report may include opinions as to the advisability of granting, denying, or modifying the certificate. The department shall allocate funds obtained from filing fees to the departments making reports to reimburse them for the costs of compiling information and issuing the required report.

History: En. Sec. 7, Ch. 327, L. 1973; amd. Sec. 3, Ch. 268, L. 1974; amd. Sec. 39, Ch. 213, L. 1975; amd. Sec. 7, Ch. 494, L. 1975; R.C.M. 1945, 70-807(1), (2); amd. Sec. 2, Ch. 218, L. 1979; amd. Sec. 8, Ch. 676, L. 1979; amd. Sec. 6, Ch. 274, L. 1981; amd. Sec. 4, Ch. 539, L. 1981.

Compiler's Comments

1981 Amendments: Chapter 274 substituted "department of commerce" for "department of community affairs" in (5).

Chapter 539 inserted "or department of health" after "the board of health" in the middle of the first sentence of (3); substituted "permit required under the laws administered by the department of health or board of health and this chapter" for "permit required by state or federal air and water quality laws and this chapter" at the end of the first sentence of (3); substituted "the board of health shall determine compliance with all standards, permit require-

ments, and implementation plans under their jurisdiction" for "the board of health shall determine compliance with air and water quality standards and implementation plans" in the second sentence of (3); deleted "of air and water quality impacts under the federal and state air and water quality statutes" after "The decision, opinion, order, certification, or permit, with or without conditions, is conclusive on all matters" in the third sentence of (3); substituted "specified in subsections (2) through (7) of 75-20-503" for "specified in 75-20-503(3) and (4)" in the third sentence of (3); substituted "the determi-

nations made under the laws administered by the department of health and the board of health" for "the determinations made under federal and state air and water quality statutes" at the end of the third sentence of (3); and deleted "A decision by the department of health or board of health is subject to appellate review

pursuant to the air and water quality statutes administered by the department of health and board of health" at the end of (3).

Cross-References

Montana Environmental Policy Act, Title 75, ch. 1.

75-20-217. Voiding an application. An application may be voided by the department for:

(1) any material and knowingly false statement in the application or in accompanying statements or studies required of the applicant;

(2) failure to file an application in substantially the form and content required by this chapter and the rules adopted thereunder; or

(3) failure to deposit the filing fee as provided in 75-20-215.

History: En. Sec. 18, Ch. 327, L. 1973; amd. Sec. 18, Ch. 494, L. 1975; R.C.M. 1947, 70-818(2); amd. Sec. 9, Ch. 676, L. 1979.

75-20-218. Hearing date — location — department to act as staff — hearings to be held jointly. (1) Upon receipt of the department's report submitted under 75-20-216, the board shall set a date for a hearing to begin not more than 120 days after the receipt. Except for those hearings involving applications submitted for facilities as defined in (b) and (c) of 75-20-104(10), certification hearings shall be conducted by the board in the county seat of Lewis and Clark County or the county in which the facility or the greater portion thereof is to be located.

(2) Except as provided in 75-20-221(2), the department shall act as the staff for the board throughout the decisionmaking process and the board may request the department to present testimony or cross-examine witnesses as the board considers necessary and appropriate.

(3) At the request of the applicant, the department of health and the board of health shall hold any required permit hearings required under laws administered by those agencies in conjunction with the board certification hearing. In such a conjunctive hearing the time periods established for reviewing an application and for issuing a decision on certification of a proposed facility under this chapter supersede the time periods specified in other laws administered by the department of health and the board of health.

History: En. Sec. 7, Ch. 327, L. 1973; amd. Sec. 3, Ch. 268, L. 1974; amd. Sec. 39, Ch. 213, L. 1975; amd. Sec. 7, Ch. 494, L. 1975; R.C.M. 1947, 70-807(4); amd. Sec. 10, Ch. 676, L. 1979; amd. Sec. 5, Ch. 539, L. 1981.

Compiler's Comments

1981 Amendment: Substituted "department of health and the board of health" for "duly authorized state air and water quality agencies" near the beginning and at the end of (3).

Cross-References

Montana Administrative Procedure Act — contested cases, Title 2, ch. 4, part 6.

Public hearings on air quality rules, 75-2-205.

Public hearings on water quality rules, 75-5-307.

75-20-219. Amendments to a certificate. (1) Within 30 days after notice of an amendment to a certificate is given as set forth in 75-20-213(1), including notice to all active parties to the original proceeding, the department shall determine whether the proposed change in the facility would result in any material increase in any environmental impact of the facility or

a substantial change in the location of all or a portion of the facility other than as provided in the alternates set forth in the original application. If the department determines that the proposed change would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate. After hearing, the board shall grant, deny, or modify the amendment with such conditions as it deems appropriate.

(2) In those cases where the department determines that the proposed change in the facility would not result in any material increase in any environmental impact or would not be a substantial change in the location of all or a portion of the facility, the board shall automatically grant the amendment either as applied for or upon such terms or conditions as the board considers appropriate unless the department's determination is appealed to the board within 15 days after notice of the department's determination is given.

(3) If the department or the board under subsection (4) determines that a hearing is required because the proposed change would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility, the applicant has the burden of showing by clear and convincing evidence that the amendment should be granted.

(4) If the department determines that the proposed change in the facility would not result in any material increase in any environmental impact or would not be a substantial change in the location of all or a portion of the facility, and a hearing is required because the department's determination is appealed to the board as provided in subsection (2), the appellant has the burden of showing by clear and convincing evidence that the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility other than as provided in the alternates set forth in the original application.

(5) If an amendment is required to a certificate which would affect, amend, alter or modify a decision, opinion, order, certification, or permit issued by the department of health or board of health, such amendment must be processed under the applicable statutes administered by the department of health or board of health.

History: En. Sec. 7, Ch. 327, L. 1973; amd. Sec. 3, Ch. 268, L. 1974; amd. Sec. 39, Ch. 213, L. 1975; amd. Sec. 7, Ch. 494, L. 1975; R.C.M. 1947, 70-807(3); amd. Sec. 11, Ch. 676, L. 1979; amd. Sec. 1, Ch. 372, L. 1981.

Compiler's Comments

1981 Amendment: Substituted subsection (3) for "If a hearing is required, the applicant has

the burden of showing by clear and convincing evidence that the amendment should be granted"; and inserted subsection (4).

75-20-220. Hearing examiner — restrictions — duties. (1) If the board appoints a hearing examiner to conduct any certification proceedings under this chapter, the hearing examiner may not be a member of the board, an employee of the department, or a member or employee of the department of health or board of health. A hearing examiner, if any, shall be appointed by the board within 20 days after the department's report has been filed with

the board. If a hearing is held before the board of health or the department of health, the board and the board of health or the department of health shall mutually agree on the appointment of a hearing examiner to preside at both hearings.

(2) A prehearing conference shall be held following notice within 60 days after the department's report has been filed with the board.

(3) The prehearing conference shall be organized and supervised by the hearing examiner.

(4) The prehearing conference shall be directed toward a determination of the issues presented by the application, the department's report, and an identification of the witnesses and documentary exhibits to be presented by the active parties who intend to participate in the hearing.

(5) The hearing examiner shall require the active parties to submit, in writing, and serve upon the other active parties, all direct testimony which they propose and any studies, investigations, reports, or other exhibits that any active party wishes the board to consider. These written exhibits and any documents that the board itself wishes to use or rely on shall be submitted and served in like manner, at least 20 days prior to the date set for the hearing. For good cause shown, the hearing examiner may allow the introduction of new evidence at any time.

(6) The hearing examiner shall allow discovery which shall be completed before the commencement of the hearing, upon good cause shown and under such other conditions as the hearing examiner shall prescribe.

(7) Public witnesses and other interested public parties may appear and present oral testimony at the hearing or submit written testimony to the hearing examiner at the time of their appearance. These witnesses are subject to cross-examination.

(8) The hearing examiner shall issue a prehearing order specifying the issues of fact and of law, identifying the witnesses of the active parties, naming the public witnesses and other interested parties who have submitted written testimony in lieu of appearance, outlining the order in which the hearing shall proceed, setting forth those section 75-20-301 criteria as to which no issue of fact or law has been raised which are to be conclusively presumed and are not subject to further proof except for good cause shown, and any other special rules to expedite the hearing which the hearing examiner shall adopt with the approval of the board.

(9) At the conclusion of the hearing, the hearing examiner shall declare the hearing closed and shall, within 60 days of that date, prepare and submit to the board and in the case of a conjunctive hearing, within 90 days to the board and the board of health or department of health proposed findings of fact, conclusions of law, and a recommended decision.

(10) The hearing examiner appointed to conduct a certification proceeding under this chapter shall insure that the time of the proceeding, from the date the department's report is filed with the board until the recommended report and order of the examiner is filed with the board, does not exceed 9 calendar months unless extended by the board for good cause.

(11) The board or hearing examiner may waive all or a portion of the procedures set forth in subsections (2) through (8) of this section to expedite the

hearing for a facility when the department has recommended approval of a facility and no objections have been filed.

History: En. Sec. 9, Ch. 327, L. 1973; amd. Sec. 9, Ch. 494, L. 1975; R.C.M. 1947, 70-809(3); amd. Sec. 12, Ch. 676, L. 1979; amd. Sec. 6, Ch. 539, L. 1981.

Compiler's Comments

1981 Amendment: Inserted "or the department of health" after "board of health" throughout the last sentence of (1) and near the end of (9).

Cross-References

Montana Administrative Procedure Act — contested cases, Title 2, ch. 4, part 6.

75-20-221. Parties to certification proceeding — waiver — statement of intent to participate. (1) The parties to a certification proceeding or to a proceeding involving the issuance of a decision, opinion, order, certification, or permit by the board of health under this chapter may include as active parties:

- (a) the applicant;
- (b) each political entity, unit of local government, and government agency, including the department of health, entitled to receive service of a copy of the application under 75-20-211(3);
- (c) any person entitled to receive service of a copy of the application under 75-20-211(5);
- (d) any nonprofit organization formed in whole or in part to promote conservation or natural beauty; to protect the environment, personal health, or other biological values; to preserve historical sites; to promote consumer interests; to represent commercial and industrial groups; or to promote the orderly development of the areas in which the facility is to be located;
- (e) any other interested person who establishes an interest in the proceeding.

(2) The department shall be an active party in any certification proceeding in which the department recommends denial of all or a portion of a facility.

(3) The parties to a certification proceeding may also include, as public parties, any Montana citizen and any party referred to in (b), (c), (d), or (e) of subsection (1).

(4) Any party waives the right to be a party if the party does not participate in the hearing before the board or the board of health.

(5) Each unit of local government entitled to receive service of a copy of the application under 75-20-211(3) shall file with the board a statement showing whether the unit of local government intends to participate in the certification proceeding. If the unit of local government does not intend to participate, it shall list in this statement its reasons for failing to do so. This statement of intent shall be published before the proceeding begins in a newspaper of general circulation within the jurisdiction of the applicable unit of local government.

History: En. Sec. 8, Ch. 327, L. 1973; amd. Sec. 8, Ch. 494, L. 1975; R.C.M. 1947, 70-808; amd. Sec. 2, Ch. 553, L. 1979; amd. Sec. 13, Ch. 676, L. 1979.

75-20-222. Record of hearing — procedure — rules of evidence — burden of proof. (1) Any studies, investigations, reports, or other documentary evidence, including those prepared by the department, which any party wishes the board to consider or which the board itself expects to utilize or rely upon shall be made a part of the record.

(2) A record shall be made of the hearing and of all testimony taken.

(3) In a certification proceeding held under this chapter, the applicant has the burden of showing by clear and convincing evidence that the application should be granted and that the criteria of 75-20-301 are met.

(4) All proceedings under this chapter are governed by the procedures set forth in this chapter, the procedural rules adopted by the board, and the Montana Rules of Evidence unless one or more rules of evidence are waived by the hearing examiner upon a showing of good cause by one or more of the parties to the hearing. No other rules of procedure or evidence shall apply except that the contested case procedures of the Montana Administrative Procedure Act shall apply if not in conflict with the procedures set forth in this chapter or the procedural rules adopted by the board.

History: En. Sec. 9, Ch. 327, L. 1973; amd. Sec. 9, Ch. 494, L. 1975; R.C.M. 1947, 70-809(1), (2); amd. Sec. 14, Ch. 676, L. 1979.

Cross-References

Montana Rules of Evidence, Title 26, ch. 10.

Montana Administrative Procedure Act —
contested cases, Title 2, ch. 4, part 6.

Part 3

Decisions

75-20-301. Decision of board — findings necessary for certification. (1) Within 60 days after submission of the recommended decision by the hearing examiner, the board shall make complete findings, issue an opinion, and render a decision upon the record, either granting or denying the application as filed or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the facility as the board considers appropriate.

(2) The board may not grant a certificate either as proposed by the applicant or as modified by the board unless it shall find and determine:

- (a) the basis of the need for the facility;
- (b) the nature of the probable environmental impact;
- (c) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives;
- (d) each of the criteria listed in 75-20-503;
- (e) in the case of an electric, gas, or liquid transmission line or aqueduct:
- (i) what part, if any, of the line or aqueduct shall be located underground;
- (ii) that the facility is consistent with regional plans for expansion of the appropriate grid of the utility systems serving the state and interconnected utility systems; and
- (iii) that the facility will serve the interests of utility system economy and reliability;
- (f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, except that the board may refuse to apply any local law or regulation if it finds that, as applied to the proposed facility, the law or regulation is unreasonably restrictive in view of the existing technology, of factors of cost or economics, or of the

needs of consumers, whether located inside or outside of the directly affected government subdivisions;

(g) that the facility will serve the public interest, convenience, and necessity;

(h) that the department of health or board of health have issued a decision, opinion, order, certification, or permit as required by 75-20-216(3); and

(i) that the use of public lands for location of the facility was evaluated and public lands were selected whenever their use is as economically practicable as the use of private lands and compatible with the environmental criteria listed in 75-20-503.

(3) In determining that the facility will serve the public interest, convenience, and necessity under subsection (2)(g) of this section, the board shall consider:

(a) the items listed in subsections (2)(a) and (2)(b) of this section;

(b) the benefits to the applicant and the state resulting from the proposed facility;

(c) the effects of the economic activity resulting from the proposed facility;

(d) the effects of the proposed facility on the public health, welfare, and safety;

(e) any other factors that it considers relevant.

(4) Considerations of need, public need, or public convenience and necessity and demonstration thereof by the applicant shall apply only to utility facilities.

History: En. Sec. 10, Ch. 327, L. 1973; amd. Sec. 10, Ch. 494, L. 1975; R.C.M. 1947, 70-810(1), (3), (4); amd. Sec. 1, Ch. 69, L. 1979; amd. Sec. 15, Ch. 676, L. 1979.

75-20-302. Conditions imposed. If the board determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon such modification, provided that the persons residing in the area affected by the modification have been given reasonable notice of the modification.

History: En. Sec. 10, Ch. 327, L. 1973; amd. Sec. 10, Ch. 494, L. 1975; R.C.M. 1947, 70-810(2); amd. Sec. 16, Ch. 676, L. 1979.

75-20-303. Opinion issued with decision — contents. (1) In rendering a decision on an application for a certificate, the board shall issue an opinion stating its reasons for the action taken.

(2) If the board has found that any regional or local law or regulation which would be otherwise applicable is unreasonably restrictive pursuant to 75-20-301(2)(f), it shall state in its opinion the reasons therefor.

(3) Any certificate issued by the board shall include the following:

(a) an environmental evaluation statement related to the facility being certified. The statement shall include but not be limited to analysis of the following information:

(i) the environmental impact of the proposed facility;

(ii) any adverse environmental effects which cannot be avoided by issuance of the certificate;

(iii) problems and objections raised by other federal and state agencies and interested groups;

(iv) alternatives to the proposed facility;

(v) a plan for monitoring environmental effects of the proposed facility; and

(vi) a time limit as provided in subsection (4), during which construction of the facility must be completed;

(b) a statement signed by the applicant showing agreement to comply with the requirements of this chapter and the conditions of the certificate.

(4) The board shall issue as part of the certificate the following time limits during which construction of a facility must be completed:

(a) For a facility as defined in (b) or (c) of 75-20-104(10) that is more than 30 miles in length, the time limit is 10 years.

(b) For a facility as defined in (b) or (c) of 75-20-104(10) that is 30 miles or less in length, the time limit is 5 years.

(c) The time limit shall be extended for periods of 2 years each upon a showing by the applicant to the board that a good faith effort is being undertaken to complete construction. Under this subsection, a good faith effort to complete construction includes the process of acquiring any necessary state or federal permit or certificate for the facility and the process of judicial review of any such permit or certificate.

(5) The provisions of subsection (4) apply to any facility for which a certificate has not been issued or for which construction is yet to be commenced.

History: En. Sec. 11, Ch. 327, L. 1973; amd. Sec. 11, Ch. 494, L. 1975; R.C.M. 1947, 70-811(1), (2); amd. Sec. 1, Ch. 120, L. 1979; amd. Sec. 4, Ch. 239, L. 1983.

Compiler's Comments

1983 Amendment: In (4)(a) and (4)(b), substituted "75-20-104(10)" for "75-20-104(7)".

Cross-References

Montana Administrative Procedure Act — judicial review, Title 2, ch. 4, part 7.

75-20-304. Waiver of provisions of certification proceedings.

(1) The board may waive compliance with any of the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part if the applicant makes a clear and convincing showing to the board at a public hearing that an immediate, urgent need for a facility exists and that the applicant did not have knowledge that the need for the facility existed sufficiently in advance to fully comply with the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part.

(2) The board may waive compliance with any of the provisions of this chapter upon receipt of notice by a utility or person subject to this chapter that a facility or associated facility has been damaged or destroyed as a result of fire, flood, or other natural disaster or as the result of insurrection, war, or other civil disorder and there exists an immediate need for construction of a new facility or associated facility or the relocation of a previously existing facility or associated facility in order to promote the public welfare.

(3) The board shall waive compliance with the requirements of subsections (2)(c), (3)(b), and (3)(c) of 75-20-301 and 75-20-501(5) and the requirements of subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3), and 75-20-303(3)(a)(iv) relating to consideration of alternative sites if the applicant makes a clear and convincing showing to the board at a public hearing that:

(a) a proposed facility will be constructed in a county where a single employer within the county has permanently curtailed or ceased operations

causing a loss of 250 or more permanent jobs within 2 years at the employer's operations within the preceding 10-year period;

(b) the county and municipal governing bodies in whose jurisdiction the facility is proposed to be located support by resolution such a waiver;

(c) the proposed facility will be constructed within a 15-mile radius of the operations that have ceased or been curtailed; and

(d) the proposed facility will have a beneficial effect on the economy of the county in which the facility is proposed to be located.

(4) The waiver provided for in subsection (3) applies only to permanent job losses by a single employer. The waiver provided for in subsection (3) does not apply to jobs of a temporary or seasonal nature, including but not limited to construction jobs or job losses during labor disputes.

(5) The waiver provided for in subsection (3) does not apply to consideration of alternatives or minimum adverse environmental impact for a facility defined in subsections (10)(b), (c), (d), or (e) of 75-20-104, for an associated facility defined in subsection (3) of 75-20-104, or for any portion of or process in a facility defined in subsection (10)(a) of 75-20-104 to the extent that the process or portion of the facility is not subject to a permit issued by the department of health or board of health.

(6) The applicant shall pay all expenses required to process and conduct a hearing on a waiver request under subsection (3). However, any payments made under this subsection shall be credited toward the fee paid under 75-20-215 to the extent the data or evidence presented at the hearing or the decision of the board under subsection (3) can be used in making a certification decision under this chapter.

(7) The board may grant only one waiver under subsections (3) and (4) for each permanent loss of jobs as defined in subsection (3)(a).

History: En. Sec. 11, Ch. 327, L. 1973; amd. Sec. 11, Ch. 494, L. 1975; R.C.M. 1947, 70-811(3), (4); amd. Sec. 17, Ch. 676, L. 1979; amd. Sec. 7, Ch. 539, L. 1981.

Compiler's Comments

1981 Amendment: Added subsections (3) through (7).

Part 4

Postcertification and Legal Responsibilities

75-20-401. Additional requirements by other governmental agencies not permitted after issuance of certificate — exceptions.

(1) Notwithstanding any other law, no state or regional agency or municipality or other local government may require any approval, consent, permit, certificate, or other condition for the construction, operation, or maintenance of a facility authorized by a certificate issued pursuant to this chapter, except that the state air and water quality agency or agencies shall retain authority which they have or may be granted to determine compliance of the proposed facility with state and federal standards and implementation plans for air and water quality and to enforce those standards.

(2) This chapter does not prevent the application of state laws for the protection of employees engaged in the construction, operation, or maintenance of a facility.

History: En. Sec. 17, Ch. 327, L. 1973; amd. Sec. 17, Ch. 494, L. 1975; R.C.M. 1947, 70-817; amd. Sec. 18, Ch. 676, L. 1979.

75-20-402. Monitoring. The board, the department, the department of health, and the board of health shall monitor the operations of all certificated facilities for assuring continuing compliance with this chapter and certificates issued hereunder and for discovering and preventing noncompliance with this chapter and the certificates. The applicant shall pay all expenses related to the monitoring plan established in subsection (3)(a)(v) of 75-20-303 to the extent federal funds available for the facility, as determined by the department of health, have not been provided for such purposes.

History: En. Sec. 20, Ch. 327, L. 1973; amd. Sec. 4, Ch. 268, L. 1974; amd. Sec. 20, Ch. 494, L. 1975; R.C.M. 1947, 70-820(2); amd. Sec. 19, Ch. 676, L. 1979.

75-20-403. Revocation or suspension of certificate. A certificate may be revoked or suspended by the board:

(1) for any material false statement in the application or in accompanying statements or studies required of the applicant if a true statement would have warranted the board's refusal to grant a certificate;

(2) for failure to maintain safety standards or to comply with the terms or conditions of the certificate; or

(3) for violation of any provision of this chapter, the rules issued thereunder, or orders of the board or department.

History: En. Sec. 18, Ch. 327, L. 1973; amd. Sec. 18, Ch. 494, L. 1975; R.C.M. 1947, 70-818(1).

75-20-404. Enforcement of chapter by residents. (1) A resident of this state with knowledge that a requirement of this chapter or a rule adopted under it is not being enforced by a public officer or employee whose duty it is to enforce the requirement or rule may bring the failure to enforce to the attention of the public officer or employee by a written statement under oath that shall state the specific facts of the failure to enforce the requirement or rule. Knowingly making false statements or charges in the affidavit subjects the affiant to penalties prescribed under the law of perjury.

(2) If the public officer or employee neglects or refuses for an unreasonable time after receipt of the statement to enforce the requirement or rule, the resident may bring an action of mandamus in the district court of the first judicial district of this state, in and for the county of Lewis and Clark. If the court finds that a requirement of this chapter or a rule adopted under it is not being enforced, the court may order the public officer or employee whose duty it is to enforce the requirement or rule to perform his duties. If he fails to do so, the public officer or employee shall be held in contempt of court and is subject to the penalties provided by law.

History: En. Sec. 19, Ch. 327, L. 1973; amd. Sec. 19, Ch. 494, L. 1975; R.C.M. 1947, 70-819(1), (2).

Cross-References

Mandamus, Title 27, ch. 26.

75-20-405. Action to recover damages to water supply. An owner of an interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from a surface or underground source may sue a person to recover damages for contamination, diminution, or interruption of the water supply proximately resulting from the operation of a facility. The remedies enumerated in this

section do not exclude the use of any other remedy which may be available under the laws of the state.

History: En. Sec. 19, Ch. 327, L. 1973; amd. Sec. 19, Ch. 494, L. 1975; R.C.M. 1947, 70-819(3).

Cross-References

Compensatory damages, right to, 27-1-202.

Consequential damages, 27-1-203.

Punitive damages — breach of obligation, 27-1-221, 27-1-303.

Actions by parties other than state — water quality, 75-5-636.

Adjudication — water rights, Title 85, ch. 2, part 2.

75-20-406. Judicial review of board, board of health, and department of health decisions. (1) Any active party as defined in 75-20-221 aggrieved by the final decision of the board on an application for a certificate may obtain judicial review of that decision by the filing of a petition in a state district court of competent jurisdiction.

(2) The judicial review procedure shall be the same as that for contested cases under the Montana Administrative Procedure Act.

(3) When the board of health or department of health conducts hearings pursuant to 75-20-216(3) and 75-20-218 and the applicant is granted a permit or certification, with or without conditions, pursuant to the laws administered by the department of health and the board of health and this chapter, the decision may only be appealed in conjunction with the final decision of the board as provided in subsections (1) and (2). If a permit or certification is denied by the department of health or the board of health, the applicant may:

(a) appeal the denial under the appellate review procedures provided in the laws administered by the department of health and the board of health; or

(b) reserve the right to appeal the denial by the department of health or the board of health until after the board has issued a final decision.

(4) Nothing in this section may be construed to prohibit the board from holding a hearing as herein provided on all matters that are not the subject of a pending appeal by the applicant under subsection (3)(a).

History: En. Sec. 12, Ch. 327, L. 1973; amd. Sec. 12, Ch. 494, L. 1975; R.C.M. 1947, 70-812; amd. Sec. 20, Ch. 676, L. 1979; amd. Sec. 8, Ch. 539, L. 1981.

Compiler's Comments

1981 Amendment: Added subsections (3) and (4).

Cross-References

Montana Administrative Procedure Act — judicial review, Title 2, ch. 4, part 7.

75-20-407. Jurisdiction of courts restricted. Except as expressly set forth in 75-20-401, 75-20-406, and 75-20-408, no court of this state has jurisdiction to hear or determine any issue, case, or controversy concerning any matter which was or could have been determined in a proceeding before the board under this chapter or to stop or delay the construction, operation, or maintenance of a facility, except to enforce compliance with this chapter or the provisions of a certificate issued hereunder pursuant to 75-20-404 and 75-20-405 or 75-20-408.

History: En. Sec. 13, Ch. 327, L. 1973; amd. Sec. 13, Ch. 494, L. 1975; R.C.M. 1947, 70-813.

75-20-408. Penalties for violation of chapter — civil action by attorney general. (1) (a) Whoever commences to construct or operate a facility without first obtaining a certificate required under 75-20-201 or a

waiver thereof under 75-20-304(2) or having first obtained a certificate, constructs, operates, or maintains a facility other than in compliance with the certificate or violates any other provision of this chapter or any rule or order adopted thereunder or knowingly submits false information in any report, 10-year plan, or application required by this chapter or rule or order adopted thereunder or causes any of the aforementioned acts to occur is liable for a civil penalty of not more than \$10,000 for each violation.

(b) Each day of a continuing violation constitutes a separate offense.

(c) The penalty is recoverable in a civil suit brought by the attorney general on behalf of the state in the district court of the first judicial district of Montana.

(2) Whoever knowingly and willfully violates subsection (1) shall be fined not more than \$10,000 for each violation or imprisoned for not more than 1 year, or both. Each day of a continuing violation constitutes a separate offense.

(3) In addition to any penalty provided in subsection (1) or (2), whenever the department determines that a person is violating or is about to violate any of the provisions of this section, it may refer the matter to the attorney general who may bring a civil action on behalf of the state in the district court of the first judicial district of Montana for injunctive or other appropriate relief against the violation and to enforce this chapter or a certificate issued hereunder. Upon a proper showing, a permanent or preliminary injunction or temporary restraining order shall be granted without bond.

(4) The department shall also enforce this chapter and bring legal actions to accomplish the enforcement through its own legal counsel.

(5) All fines and penalties collected shall be deposited in the state special revenue fund for the use of the department in administering this chapter.

History: En. Sec. 21, Ch. 327, L. 1973; amd. Sec. 2, Ch. 270 L. 1975; amd. Sec. 21, Ch. 494, L. 1975; R.C.M. 1947, 70-821; amd. Sec. 16, Ch. 68, L. 1979; amd. Sec. 21, Ch. 676, L. 1979; amd. Sec. 1, Ch. 277, L. 1983.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

75-20-409. Optional annual installments for location of facility on landowner's property. A landowner upon whose land a facility is proposed to be located shall have the option of receiving any negotiated settlement for use of his land, if and when the land is used for a facility, by easement, right-of-way, or other legal conveyance in either a lump sum or in not more than five consecutive annual installments.

History: En. Sec. 1, Ch. 71, L. 1979.

75-20-410. Order not stayed by appeal — stay or suspension by court — limitations. Notwithstanding any contrary provision in the law, the pendency of an appeal from a board order does not automatically stay or suspend the operation of the order. During the pendency of the appeal, the court may upon motion by one of the parties stay or suspend, in whole or in part, the operation of the board's orders on terms the court considers just. The court's action must be in accordance with the practice of courts exercising equity jurisdiction, subject to the following limitations:

(1) No stay may be granted without notice to the parties and an opportunity to be heard by the court.

(2) No board order may be stayed or suspended without finding that irreparable damage would otherwise result to the party seeking the stay or suspension, and any other stay or suspension of a board order must specify the nature of the damage.

History: En. Sec. 24, Ch. 676, L. 1979.

75-20-411. Surety bond — other security. If an order of the board is stayed or suspended, the court may require a bond with good and sufficient surety conditioned that the party petitioning for review answer for all damages caused by the delay in enforcing the order of the board; except that the cost of the bond is not chargeable to the applicant as part of the fee. If the party petitioning for review prevails upon final resolution of an appeal, he does not forfeit bond nor is he responsible for damages caused by delay.

History: En. Sec. 25, Ch. 676, L. 1979.

Part 5

Long-Range Plans

75-20-501. Annual long-range plan submitted — contents — available to public. (1) Each utility and each person contemplating the construction of a facility within this state in the ensuing 10 years shall furnish annually to the department for its review a long-range plan for the construction and operation of facilities.

(2) The plan shall be submitted by April 1 of each year and must include the following:

(a) the general location, size, and type of all facilities to be owned and operated by the utility or person whose construction is projected to commence during the ensuing 10 years, as well as those facilities to be removed from service during the planning period;

(b) in the case of utility facilities, a description of efforts by the utility or person to coordinate the plan with other utilities or persons so as to provide a coordinated regional plan for meeting the energy needs of the region;

(c) a description of the efforts to involve environmental protection and land use planning agencies in the planning process, as well as other efforts to identify and minimize environmental problems at the earliest possible stage in the planning process;

(d) projections of the demand for the service rendered by the utility or person and explanation of the basis for those projections and a description of the manner and extent to which the proposed facilities will meet the projected demand; and

(e) additional information that the board by rule or the department on its own initiative or upon the advice of interested state agencies might request in order to carry out the purposes of this chapter.

(3) The plan shall be furnished to the governing body of each county in which any facility included in the plan under (2)(a) of this section is proposed to be located and made available to the public by the department. The utility or person shall give public notice throughout the state of its plan by

filing the plan with the environmental quality council, the department of health and environmental sciences, the department of highways, the department of public service regulation, the department of state lands, the department of fish, wildlife, and parks, and the department of commerce. Citizen environmental protection and resource planning groups and other interested persons may obtain a plan by written request and payment therefor to the department.

(4) A rural electric cooperative may furnish the department with a copy of the long-range plan and 2-year work plan required to be completed under federal rural electrification requirements in lieu of the long-range plan required in subsection (1).

(5) No person may file an application for a facility unless the facility had been adequately identified in a long-range plan at least 2 years prior to acceptance of an application by the department.

History: En. Sec. 14, Ch. 327, L. 1973; amd. Sec. 40, Ch. 213, L. 1975; amd. Sec. 14, Ch. 494, L. 1975; R.C.M. 1947, 70-814; amd. Sec. 17, Ch. 68, L. 1979; amd. Sec. 3, Ch. 553, L. 1979; amd. Sec. 22, Ch. 676, L. 1979; amd. Sec. 6, Ch. 274, L. 1981.

Compiler's Comments

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (3).

75-20-502. Study of included facilities. If a utility or person lists and identifies a proposed facility in its plan, submitted pursuant to 75-20-501, as one on which construction is proposed to be commenced within the 5-year period following submission of the plan, the department shall commence examination and evaluation of the proposed site to determine whether construction of the proposed facility would unduly impair the environmental values in 75-20-503. This study may be continued until such time as a person files an application for a certificate under 75-20-211. Information gathered under this section may be used to support findings and recommendations required for issuance of a certificate.

History: En. Sec. 15, Ch. 327, L. 1973; amd. Sec. 15, Ch. 494, L. 1975; R.C.M. 1947, 70-815.

75-20-503. Environmental factors evaluated. In evaluating long-range plans, conducting 5-year site reviews, and evaluating applications for certificates, the board and department shall give consideration to the following list of environmental factors, where applicable, and may by rule add to the categories of this section:

- (1) energy needs:
 - (a) growth in demand and projections of need;
 - (b) availability and desirability of alternative sources of energy;
 - (c) availability and desirability of alternative sources of energy in lieu of the proposed facility;
 - (d) promotional activities of the utility which may have given rise to the need for this facility;
 - (e) socially beneficial uses of the output of this facility, including its uses to protect or enhance environmental quality;
 - (f) conservation activities which could reduce the need for more energy;
 - (g) research activities of the utility of new technology available to it which might minimize environmental impact;

- (2) land use impacts:
 - (a) area of land required and ultimate use;
 - (b) consistency with areawide state and regional land use plans;
 - (c) consistency with existing and projected nearby land use;
 - (d) alternative uses of the site;
 - (e) impact on population already in the area, population attracted by construction or operation of the facility itself;
 - (f) impact of availability of energy from this facility on growth patterns and population dispersal;
 - (g) geologic suitability of the site or route;
 - (h) seismologic characteristics;
 - (i) construction practices;
 - (j) extent of erosion, scouring, wasting of land, both at site and as a result of fossil fuel demands of the facility;
 - (k) corridor design and construction precautions for transmission lines or aqueducts;
 - (l) scenic impacts;
 - (m) effects on natural systems, wildlife, plant life;
 - (n) impacts on important historic architectural, archeological, and cultural areas and features;
 - (o) extent of recreation opportunities and related compatible uses;
 - (p) public recreation plan for the project;
 - (q) public facilities and accommodation;
 - (r) opportunities for joint use with energy-intensive industries or other activities to utilize the waste heat from facilities;
 - (s) opportunities for using public lands for location of facilities whenever as economically practicable as the use of private lands and compatible with the requirements of this section;
- (3) water resources impacts:
 - (a) hydrologic studies of adequacy of water supply and impact of facility on streamflow, lakes, and reservoirs;
 - (b) hydrologic studies of impact of facilities on groundwater;
 - (c) cooling system evaluation, including consideration of alternatives;
 - (d) inventory of effluents, including physical, chemical, biological, and radiological characteristics;
 - (e) hydrologic studies of effects of effluents on receiving waters, including mixing characteristics of receiving waters, changed evaporation due to temperature differentials, and effect of discharge on bottom sediments;
 - (f) relationship to water quality standards;
 - (g) effects of changes in quantity and quality on water use by others, including both withdrawal and in situ uses;
 - (h) relationship to projected uses;
 - (i) relationship to water rights;
 - (j) effects on plant and animal life, including algae, macroinvertebrates, and fish population;
 - (k) effects on unique or otherwise significant ecosystems, e.g., wetlands;
 - (l) monitoring programs;
- (4) air quality impacts:
 - (a) meteorology—wind direction and velocity, ambient temperature ranges, precipitation values, inversion occurrence, other effects on dispersion;

- (b) topography—factors affecting dispersion;
- (c) standards in effect and projected for emissions;
- (d) design capability to meet standards;
- (e) emissions and controls:
 - (i) stack design;
 - (ii) particulates;
 - (iii) sulfur oxides;
 - (iv) oxides of nitrogen; and
 - (v) heavy metals, trace elements, radioactive materials, and other toxic substances;
- (f) relationship to present and projected air quality of the area;
- (g) monitoring program;
- (5) solid wastes impacts:
 - (a) solid waste inventory;
 - (b) disposal program;
 - (c) relationship of disposal practices to environmental quality criteria;
 - (d) capacity of disposal sites to accept projected waste loadings;
 - (6) radiation impacts:
 - (a) land use controls over development and population;
 - (b) wastes and associated disposal program for solid, liquid, radioactive, and gaseous wastes;
 - (c) analyses and studies of the adequacy of engineering safeguards and operating procedures;
 - (d) monitoring—adequacy of devices and sampling techniques;
 - (7) noise impacts:
 - (a) construction period levels;
 - (b) operational levels;
 - (c) relationship of present and projected noise levels to existing and potential stricter noise standards;
 - (d) monitoring—adequacy of devices and methods.

History: En. Sec. 16, Ch. 327, L. 1973; amd. Sec. 16, Ch. 494, L. 1975; R.C.M. 1947, 70-816; amd. Sec. 2, Ch. 69, L. 1979; amd. Sec. 23, Ch. 676, L. 1979.

Parts 6 through 9 reserved

Part 10

Geothermal Exploration

75-20-1001. Geothermal exploration — notification of department. The board shall adopt rules requiring every person who proposes to gather geological data by boring of test holes or other underground exploration, investigation, or experimentation related to the possible future development of a facility employing geothermal resources to comply with the following requirements:

- (1) notify the department of the proposed action;
- (2) submit to the department a description of the area involved;
- (3) submit to the department a statement of the proposed activities to be conducted and the methods to be utilized;

(4) submit to the department geological data reports at such times as may be required by the rules; and

(5) submit such other information as the board may require in the rules.

History: En. Sec. 20, Ch. 327, L. 1973; amd. Sec. 4, Ch. 268, L. 1974; amd. Sec. 20, Ch. 494, L. 1975; R.C.M. 1947, 70-820(3).

Cross-References

Montana Administrative Procedure Act —
adoption of rules, Title 2, ch. 4, part 3.

Injury caused by geothermal exploration —
Statute of Limitations, 27-2-303.

Part 11

Energy Conversion Facility

(Repealed. Sec. 28, Ch. 676, L. 1979)

Part Compiler's Comments

517, L. 1975; R.C.M. 1947, 70-825 through
70-829.

Histories of Repealed Sections:

75-20-1101 through 75-20-1105. En.
70-825 through 70-829 by Sec. 1 through 5, Ch.

Part 12

Nuclear Energy Conversion

Part Cross-References

Control of radioactive substances, Title 75,
ch. 3.

Montana Hazardous Waste Act, Title 75, ch.
10, part 4.

75-20-1201. Purpose — findings as to nuclear safety — reservation of nuclear facility approval powers to the people. (1) The people of Montana find that substantial public concern exists regarding nuclear reactors and other major nuclear facilities, including the following unresolved issues:

(a) the generation of waste from nuclear facilities, which remains a severe radiological hazard for many thousands of years and to which no means of containment assuring the protection of future generations exists;

(b) the spending of scarce capital to pay the rapidly increasing costs of nuclear facilities, preventing the use of that capital to finance renewable energy sources which hold more promise for supplying useful energy, providing jobs, and holding down energy costs;

(c) the liability of nuclear facilities to sudden catastrophic accidents which can affect large areas of the state, thousands of people, and countless future generations;

(d) the refusal of utilities, industry, and government to assume normal financial responsibility for compensating victims of such nuclear accidents;

(e) the impact of nuclear facilities on the proliferation of nuclear bombs and terrorism;

(f) the increasing pattern of abandonment of used nuclear facilities by their owners, resulting in radiological dangers to present and future societies as well as higher public costs for perpetual management; and

(g) the detrimental effect of the large uranium import program necessary to the expansion of nuclear power on American energy independence, defense policy, and economic well being.

(2) Therefore, the people of Montana reserve to themselves the exclusive right to determine whether major nuclear facilities are built and operated in this state.

History: En. Sec. 1, I.M. 80, app. Nov. 7, 1978.

75-20-1202. Definitions. As used in this part and 75-20-201 through 75-20-203, the following definitions apply:

(1) (a) "Nuclear facility" means each plant, unit, or other facility designed for, or capable of:

(i) generating 50 megawatts of electricity or more by means of nuclear fission;

(ii) converting, enriching, fabricating, or reprocessing uranium minerals or nuclear fuels; or

(iii) storing or disposing of radioactive wastes or materials from a nuclear facility.

(b) "Nuclear facility" does not include any small-scale facility used solely for educational, research, or medical purposes not connected with the commercial generation of energy.

(2) "Facility," as defined in 75-20-104(7) is further defined to include any nuclear facility as defined in subsection (1)(a) of this section.

History: En. Sec. 2, I.M. 80, app. Nov. 7, 1978.

75-20-1203. Additional requirements for issuance of a certificate for the siting of a nuclear facility. (1) The board may not issue a certificate to construct a nuclear facility unless it finds that:

(a) no legal limits exist regarding the rights of a person or group of persons to bring suit for and recover full and just compensation from the designers, manufacturers, distributors, owners, and/or operators of a nuclear facility for damages resulting from the existence or operation of the facility; and further, that no legal limits exist regarding the total compensation which may be required from the designers, manufacturers, distributors, owners, and/or operators of a nuclear facility for damages resulting from the existence or operation of such facility;

(b) the effectiveness of all safety systems, including but not limited to the emergency core cooling systems, of such nuclear facility has been demonstrated, to the satisfaction of the board, by the comprehensive laboratory testing of substantially similar physical systems in actual operation;

(c) the radioactive materials from such nuclear facilities can be contained with no reasonable chance, as determined by the board, of intentional or unintentional escape or diversion of such materials into the natural environment in such manner as to cause substantial or long-term harm or hazard to present or future generations due to imperfect storage technologies, earthquakes or other acts of God, theft, sabotage, acts of war or other social instabilities, or whatever other causes the board may deem to be reasonably possible, at any time during which such materials remain a radiological hazard; and

(d) the owner of such nuclear facility has posted with the board a bond totalling not less than 30% of the total capital cost of the facility, as estimated by the board, to pay for the decommissioning of the facility and the decontamination of any area contaminated with radioactive materials due to

the existence or operation of the facility in the event the owner fails to pay the full costs of such decommissioning and decontamination. Excess bond, if any, shall be refunded to the owner upon demonstration, to the satisfaction of the board, that the site and environs of the facility pose no radiological danger to present or future generations and that whatever other conditions the board may deem reasonable have been met.

(2) Nothing in this section shall be construed as relieving the owner of a nuclear facility from full financial responsibility for the decommissioning of such facility and decontamination of any area contaminated with radioactive materials as a result of the existence or operation of such facility at any time during which such materials remain a radiological hazard.

History: En. Sec. 4, I.M. 80, app. Nov. 7, 1978.

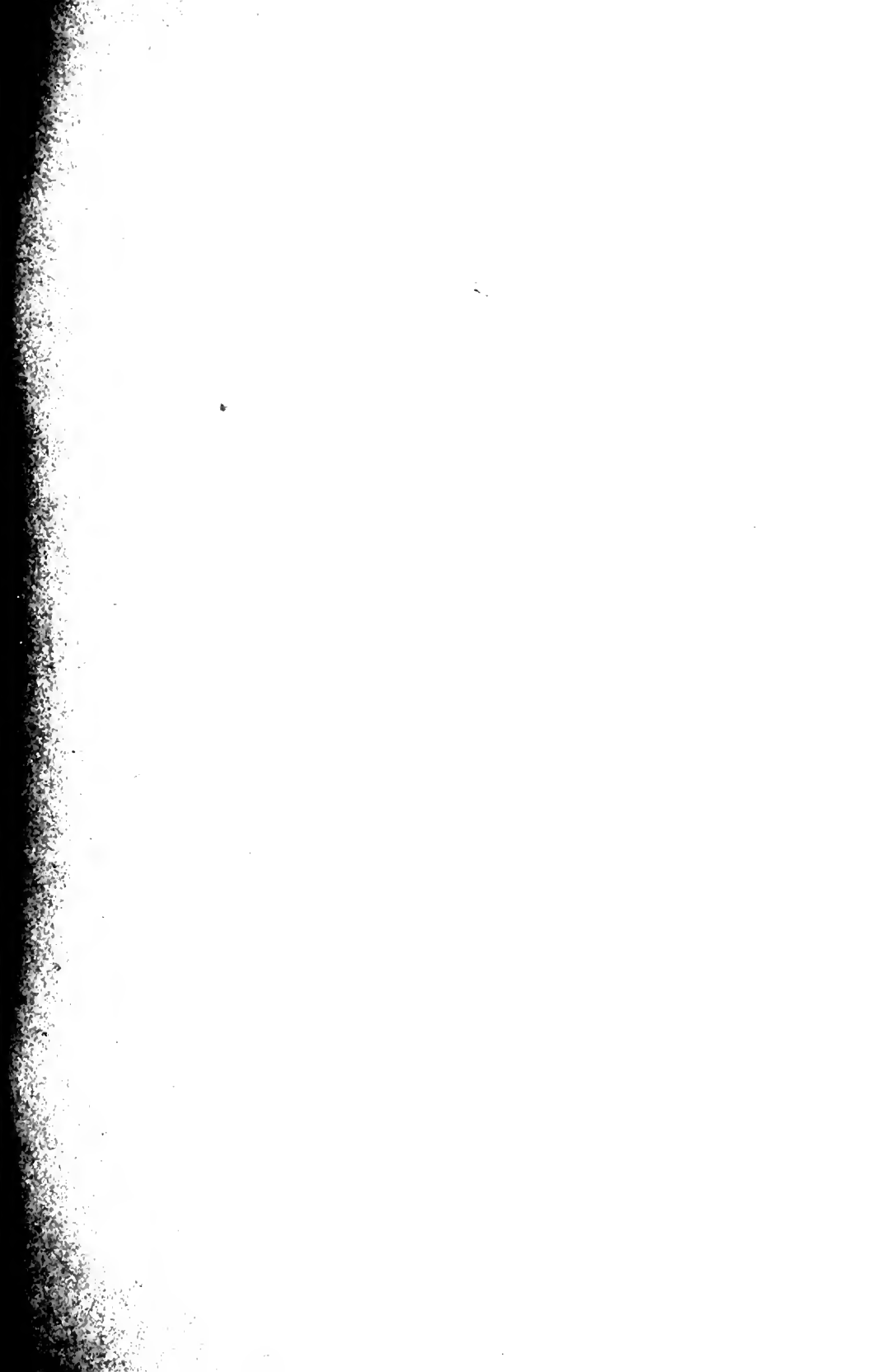
75-20-1204. Annual review of evacuation and emergency medical aid plans. (1) The governor shall annually publish, publicize, and release to the news media and to the appropriate officials of affected communities, in a manner designed to inform residents of the affected communities, the entire evacuation plan specified in the licensing of each certified nuclear facility within this state. Copies of such plan shall be made available to the public upon request at no more than the cost of reproduction.

(2) The governor shall establish procedures for annual review by state and local officials of established evacuation and emergency medical aid plans with regard for, but not limited to, such factors as the adequacy of such plans, changes in traffic patterns, population densities, the locations of schools, hospitals, and industrial developments, and other factors as requested by locally elected representatives.

History: En. Sec. 5, I.M. 80, app. Nov. 7, 1978.

75-20-1205. Emergency approval authority invalid for nuclear facilities. Notwithstanding the provisions of subsections (2) and (3) of 75-20-304, the board may not waive compliance with any of the provisions of this part or 75-20-201 through 75-20-203 relating to certification of a nuclear facility.

History: En. Sec. 6, I.M. 80, app. Nov. 7, 1978.



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